No. _____

In The

Supreme Court of the United States

KELLY HACKWORTH,

Petitioner,

v.

PROGRESSIVE CASUALTY INSURANCE COMPANY, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal regulation measuring the legislative term, "within 75 miles," with surface transportation miles, rather than radius miles, conflicts with other court decisions, contradicts the intent and history of the statute in question and results in an arbitrary application of FMLA law.

2. Whether the denial of a motion under Federal Rule of Civil Procedure 56(f) is proper when a court decides a question of fact before *any* discovery *can* been conducted.

3. Whether the presentation of a Rule 56(f) affidavit on a motion to reconsider under Rule 59 is untimely.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Tenth Circuit.

The Petitioner here and Appellant below is Kelly Hackworth.

The Respondents here and Appellees below are Progressive Casualty Insurance Company, an Ohio corporation, and Jerry Johnson, individually.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at *Hackworth v. Progressive Casualty Insurance Co.*, 468 F.3d 722 (10th Cir. 2006). The opinion is reprinted in the Appendix hereto, pp. 1a-21a. The orders from the district court granting summary judgment and denying the motion for reconsideration were not reported but are reprinted in the Appendix hereto, pp. 22a-28a.

JURISDICTION

The Court of Appeals for the Tenth Circuit entered its judgment on November 14, 2006. Appendix 1a. Petitioner Kelly Hackworth ("Hackworth") timely sought rehearing en banc, and the Court of Appeals denied that on December 18, 2006. Appendix 29a. She now seeks review of that judgment on a writ of certiorari.

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review on a writ of certiorari the judgment of a federal court of appeals.

STATUTORY PROVISIONS INVOLVED

Title 29 United States Code, Section 2611(2)(B)(ii).

(2) Eligible Employee.

(B) Exclusions. The term "eligible employee" does not include –

. . .

(ii) any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50.

Federal Rule of Civil Procedure Rule 56(f).

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

STATEMENT OF THE CASE

A. Summary of Facts

Kelly Hackworth ("Hackworth") began working for Progressive Casualty Insurance Company ("Progressive") on or about the 26th day of March, 1996, and was promoted to Injury Ops Manager ("IOM") II in 2000. In 2002, Jerry Johnson ("Johnson") became State Claims Manager in Oklahoma and provided direct supervision over Hackworth's work activities. In his efforts to reorganize the department, he re-leveled Hackworth's position to an Injury Operations Manager I in January 2004.

On March 22, 2004, because Hackworth was dealing with her own illness and because her mother became ill

and was hospitalized, Hackworth contacted Progressive and requested time under the Family Medical Leave Act ("FMLA"). On that same day, Johnson offered Hackworth the option of either accepting a severance package due to the re-leveling or continuing in the IOM I position. On March 23, 2004, Hackworth went on leave under the FMLA.

On April 23, 2004, Hackworth filed a charge of gender-based discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging violation of Title VII of the Civil Rights Act of 1964, as amended, but reported her willingness and ability to return to work on May 28, 2004. However, Amy Harlan ("Harlan"), one of Progressive's employees, advised Hackworth not to return to work because her presence would be "uncomfortable" for everyone until after the EEOC mediation was completed on June 8, 2004.

Although Hackworth advised that she would return to work and continue as an Injury Ops Manager I at the end of her agreed, extended FMLA leave, Harlan then contacted Hackworth and advised her not to return to work because the position of Injury Ops Manager I was eliminated in its entirety. Neither Harlan nor any other agent or employee of Progressive offered Hackworth any other equivalent work or compensation. The supposed eliminated position was posted publicly soon thereafter and was later filled on September 29, 2004.

B. Course of Proceedings Below

On January 4, 2005, Hackworth filed her Complaint against Progressive and Johnson alleging that Respondents violated the Family and Medical Leave Act ("FMLA") by failing to reinstate Hackworth to her same or

a similar position upon her return from leave, and by retaliating against Hackworth for engaging in a protected activity, namely, utilizing FMLA for time off work.

On March 29, 2005, Respondents filed a motion for summary judgment claiming that Hackworth did not have jurisdiction to file suit under FMLA because Progressive did not employ fifty (50) people within seventy-five (75) miles of Hackworth's main worksite at the time Hackworth filed for leave under FMLA. At the time Respondents filed for summary judgment, the parties had not held their status and scheduling conference, nor had a discovery conference been held pursuant to Fed.R.Civ.P. Rule 26.

Hackworth responded to the brief and denied many of the so-called material facts. Hackworth also pointed out the fact that no discovery had been accomplished and that Respondents produced no real evidence in their motion to support their claims about the number of employees at the different worksites in Oklahoma. Essentially, Hackworth argued that since the Lawton worksite is within seventy-five (75) radius miles of Hackworth's Norman site, then its employees should be included in determining whether Hackworth is an eligible employee. Also, at the time Hackworth filed her response, there had been no persuasive case law regarding the proper measure of the required 75-mile distance.

Respondents filed a reply brief and relied heavily, for the first time, on 29 C.F.R. § 825.111(b), which measures the distance by surface miles using surface transportation. Before Hackworth could file a sur reply to respond to Respondents' argument, the district court entered an Order granting the summary judgment on April 28, 2005.

On May 2, 2005, Hackworth filed a motion for reconsideration, and submitted an affidavit under Fed.R.Civ.P. Rule 56(f). Respondents filed a response on May 5, 2005, and the district court denied Hackworth's motion on that same day.

On May 27, 2005, Hackworth appealed both orders to the United States Court of Appeals for the Tenth Circuit with a Notice of Appeal. The Tenth Circuit issued its Opinion on November 14, 2006, and affirmed the district court's orders. Hackworth filed a Petition for Rehearing En Banc on the district court's denial of relief under Fed.R.Civ.P. Rule 56. That petition was denied on December 18, 2006.

REASONS WHY CERTIORARI SHOULD BE GRANTED

The instant matter is unique and worthy of review because it involves the interpretation of a federal statute with broad-ranging effects upon the businesses and workforce of America. At issue is statutory language which determines whether employees receive the protections provided by the Family and Medical Leave Act ("FMLA"). Only employees employed at a worksite at which his or her employer employs more than 50 employees within 75 miles of that worksite is an eligible employee under the FMLA and able to take advantage of the statute's benefits. See 29 U.S.C. § 2611(2)(B)(ii).

The unanswered question posed by the statute is how to determine and measure "within 75 miles." Because no specific measurement technique is referenced in the statute, the determination needs to be made as to whether

"within 75 miles" should be measured by radius miles or surface transportation miles. The history reports for the statute indicate that Congress was contemplating a radius measurement, and such a technique is more uniform, consistent, and reasonable. Other circuit courts have also seemingly used a 75-mile radius when discussing the geographic limitation.

However, the federal regulations recommend that the 75-mile computation be measured by surface miles, using surface transportation over public streets, roads, highways and waterways by the shortest route from the facility where the eligible employee needing leave is employed. See 29 C.F.R. § 825.111(b). By finding that this federal regulation is a valid implementation of FMLA law, the majority incorrectly decided an issue central to the application of FMLA, and in turn has decided a matter worthy of this Court's review. Essentially, review is necessary to finally decide the correct interpretation of the statutory language in question, that is, whether "within 75 miles" is measured by radius miles or surface transportation miles.

Hackworth also contends that review is necessary regarding the intent, purpose, and timeliness of requesting relief under Fed.R.Civ.P. 56(f). The majority failed to recognize that Hackworth has had zero opportunity to conduct discovery on a question of fact, and has therefore decided an issue in conflict with earlier decisions of this Court.

I. Review is Warranted Because the Majority Opinion Conflicts with Other Circuit Courts Regarding the Correct Measurement of the 75-mile Geographic Limitation included in 29 U.S.C. § 2611(2)(B)(ii)

The majority opinion in the instant matter concludes that the language "within 75 miles" included within 29 U.S.C. § 2611(2)(B)(ii) should not be measured using a radius computation. However, most of the Circuit Courts discussing this particular statutory provision have interpreted the language by ignoring the interpretation set forth by the Department of Labor in 29 C.F.R. § 825.111(b) and by using 75 radius miles without even discussing the issue.

Courts in several different circuits have all referenced a 75-mile ***radius*** when discussing the application of FMLA and its geographical limitations. See *Minard v. ITC Deltacom Communs., Inc.*, 447 F.3d 352, 355 (5th Cir. 2006) (employee not an eligible employee due to there being less than 50 employees within a 75-mile radius of her worksite on the day she requested); *Harbert v. Healthcare Servs. Group, Inc.*, 391 F.3d 1140, 1149 (10th Cir. 2004) (quoting House Report stating that there is a " . . . geographic limitation of a 75-mile radius that applies to the aggregation of employees at different facilities."); *Morrison v. Magic Carpet Aviation*, 383 F.3d 1253, 1254 (11th Cir. 2004) (in order for the statute to apply, the employer(s) at issue must have at least 50 employees within a 75-mile radius of the worksite); *Moreau v. Air Fr.*, 356 F.3d 942, 945 (9th Cir. 2004) (employer employed fewer than 50 employees at Moreau's worksite or within a 75-mile radius, and thus was exempt from the FMLA); *Thomas v. Pearle Vision*, 251 F.3d 1132, 1139, fn. 3 (7th

Cir. 2001) (it is presumed that all employees in major metropolitan areas are eligible because it is likely that there are more than 50 employees within a 75-mile radius).

Numerous district courts have also found that the distance is measured using radius miles. See *Nordquist v. City Finance Co.*, 173 F.Supp.2d 537 (N.D.Miss. 2001) (holding that plaintiff was not eligible for FMLA leave because there were less than 50 employees within a 75-mile radius); *Paleologos v. Rehab Consultants, Inc.*, 990 F.Supp. 1460 (N.D.Ga. 1998) (finding that plaintiff must demonstrate that employer employed at least 50 employees within a 75-mile radius); *Rollins v. Wilson County Government*, 967 F.Supp. 990 (M.D.Tenn. 1997) (holding that an "eligible employee" must be employed at worksite with at least 50 employees within a 75-mile radius); *Figueira v. Black Entertainment Television, Inc.*, 944 F.Supp. 299 (S.D.N.Y. 1996) (finding that an "eligible employee" must work for an employer with 50 employees within a 75-mile radius); *Rich v. Delta Air Lines, Inc.*, 921 F.Supp. 767 (N.D.Ga. 1996) (holding that an "eligible employee" must be employed at worksite with at least 50 employees within a 75-mile radius); *Sylvester v. Dead River Co.*, 260 F.Supp.2d 181, 186 (D.Me. 2003) (stating that the record does not contain number of employees within a 75-mile radius of worksite); *Lincoln v. Sears, Roebuck and Co.*, 2002 WL 31108204 (D.Minn. 2002) (defendant argued that there were not 50 employees within a 75-mile radius).

Hackworth admits that none of these cases directly discuss what the correct form of measurement should be, but the sheer number of authorities highlights an important aspect of the discussion. The case authority has

almost unanimously determined that the computation used to measure the distance between worksites is a linear measurement and not surface transportation miles. In fact, besides the only other case to tackle this specific subject in the Fifth Circuit, *Bellum v. PCE Constructors, Inc.*, 407 F.3d 734 (5th Cir. 2005), Hackworth can find no decision in which a court refers to the 75-mile measurement as 75 driving miles or 75 road miles when discussing the eligibility requirements of the FMLA.

Hackworth contends that there is no such case authority regarding road miles because when interpreting similar geographical limitation language passed by Congress in other areas, other courts have found that the use of radius miles is the correct methodology. For example, in *Sprow v. Hartford Ins. Co.*, 594 F.2d 412 (5th Cir. 1979), the Fifth Circuit considered the correct method to use in which to measure distance required by the language governing service of process. Federal Rules of Civil Procedure, Rule 4 states that service of a summons or filing a waiver of service will establish jurisdiction over the person of a defendant who is a "party joined under Rule 14 or Rule 19 and is served at a place within a judicial district of the United States and not more than 100 miles from the place from which the summons issues." Fed.R.Civ.P. 4(k)(1)(B).

The Fifth Circuit ultimately held that the "simplest and most proper method is the straight lines or 'as the crow flies' measure of air miles", and that this measurement offers a more uniform standard than a measure based on road miles, which "will continually fluctuate as new and different routes are constructed." *Sprow*, 594 F.2d at 417. The *Sprow* Court further cited additional courts that have also adopted the "as the crow flies" mode of

calculation. *See Lee v. Ohio Cas. Ins. Co.*, 445 F.Supp. 189, 193 n.12 (D.Del. 1978); *Pillsbury Co. v. Delta Boat & Barge Rental, Inc.*, 72 F.R.D. 630, 631 (E.D.La. 1976); *Deloro Smelting and Refining Co. v. Engelhard Minerals and Chemicals Corp.*, 313 F.Supp. 470, 473-75 (D.N.J. 1970); *Pierce v. Globemaster Baltimore, Inc.*, 49 F.R.D. 63, 66 (D.Md. 1969).

Additionally, the majority's opinion conflicts with the method of measuring similar language as contained in the Sherman Act. The issue was the language in 15 U.S.C. § 1293, which places a limitation on telecasting games located "within 75 miles of the game site of any intercollegiate or interscholastic football contest. . . ." In a Tenth Circuit case, the district court and the circuit court found, without argument, that the term "within 75 miles" meant within a 75-mile radius. *Colorado High School Activities Assoc. v. National Football League*, 524 F.Supp. 60 (U.S. Dist. Ct. Colo. 1981); affirmed by *Colorado High School Activities Assoc. v. National Football League*, 711 F.2d 943 (10th Cir. 1983) (to provide the required circular umbrella of protection, "there had to be a point to which its radius could be measured, and limited, to 75 miles.")

Also of relevant comparison to the instant determination is the case of *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 212 (3rd Cir. 2005) (disregarding argument that 30-mile radius ignores the geography of the region and makes actual distances that patients must travel much greater than that perceived when relying on an "as the crow flies" radius).

In summary, the majority opinion has entered a decision in conflict with decisions of other court of appeals on the issue of whether the geographical limitation contained within the FMLA should be measured using a

radius computation. Other courts have found that a 75-mile radius should be used in determining an eligible employee, and courts considering the correct method of measurement for other statutory limitations have utilized the linear computation. This Court should grant review to resolve this discrepancy.

II. Review is Warranted Because the Majority Opinion Validates a Federal Regulation that is Contrary to the History and Intent of the Statute

Because the majority has validated a federal regulation that appears to be in conflict with the legislative history of the statute, clarification is needed by this Court regarding the history and intent of 29 U.S.C. § 2611(2)(B)(ii). Hackworth contends that Congress spoke directly on the correct measurement of the 75-mile requirement contained in 29 U.S.C. § 2611(2)(B)(ii) and indicated that a radius measurement should be utilized when determining eligible employee status. However, the majority discounts the legislative history in its analysis and validates the federal regulation although it appears to interpret the statute in question in a way contrary to the statute's intent.

In determining the first step of the analysis laid out in this Court's opinion in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 2781, 81 L. Ed. 2d 694 (1984), both the district court and circuit court should avail itself of the traditional means of statutory interpretation which includes the text itself, its history, and its purpose. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 124 S. Ct. 1236, 1248-49, 157 L. Ed. 2d 1094 (2004). If it is determined that

Congress has spoken to the precise question at issue after examination of the text, its history and its purpose, such intent must control. *Chevron*, 467 U.S. at 842-43.

It is true that the text of the statute in question provides no clear and direct guidance as to the proper measurement technique, but it also does not belie the claim that a linear mileage test should be utilized. In fact, the history of the statutory language indicates that Congress intended to utilize the radius test as the correct measurement of the 75-mile geographic boundary. **On numerous occasions within every House and Senate Report drafted to discuss the FMLA, Congress makes reference to "a 75-mile *radius*"** [Emphasis added]. See H.R. Rep. No. 102-35(I), at 37 (1991), H.R. Rep. No. 101-28(I), at 24 (1989) ("For purposes of determining the size of an employer, there is a geographic limitation of ***a 75-mile radius*** that applies to the aggregation of employees at different facilities" [Emphasis added]); S. Rep. No. 103-3, at 2, 25, 42, 43 (1993); S. Rep. No. 102-68, at 58, 59-60 (1991). It also appears that the cost projections, estimates, and impact statements done by the General Accounting Office and the Congressional Budget Office have used the term "radius" when discussing the measurement between worksites. Respondents and the majority claim that the term radius is not used in every discussion of the 75-mile limitation, but it is undisputed that Congress never mentions "75 driving miles" or "75 surface transportation miles."

Moreover, it is somewhat disingenuous for the majority to claim that there is no indication that Congress mentioned the term "radius" in its technical sense and not in its colloquial sense. See Appendix 12a-13a. In reality, there is no difference between the ordinary and technical

meaning of the term "radius." Even junior high students understand the measurement of distance meant when the term "radius" is used because the term has a very distinct and recognizable use.

Additionally, the majority claims that the purpose of the provision in question belies Hackworth's claim that Congress intended to use a radius mile measurement, rather than a surface-mileage test. The purpose of the FMLA legislation, as set forth in 29 U.S.C. § 2601(b), is to "balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity", to entitle employees to take reasonable leave for medical reasons, and to do all of this in a manner that accommodates the legitimate interests of employers. Implementing the linear measurement of "within 75 miles" obviously contemplated by Congress would not in any way defeat this purpose.

In essence, although the legislative history is replete with references to a "75-mile radius" in which to measure the geographical limitation set forth in 29 U.S.C. § 2611(2)(B)(ii), the majority opinion discounted such guidance and found that transportation miles should be used. Review is needed by this Court to implement the true history and intent of the statute in question in furtherance of the first step set out in *Chevron*.

III. Review is Warranted Because the Majority Opinion Validates a Federal Regulation that Results in the Arbitrary Application of the Statute in Question

The use of a radius or linear measurement in determining whether an employer has 50 employees within 75 miles of a particular worksite is uniform, consistent, and plainly determined. Using this methodology, an employee in Thermopolis, Wyoming receives the same entitlement under FMLA as an employee in New York City, New York; an employee who drives a winding, meandering country road to work is afforded the same protections under FMLA as an employee who uses a straight line interstate to get to work; and employers are not involved in court proceedings to determine which route between worksites is the shortest to avoid coverage under the FMLA. In other words, not only is the federal regulation in question manifestly contrary to the statute it is interpreting, its application is arbitrary and capricious and should not have been honored by the majority opinion.

According to this Court in *Chevron*, the second test to examine is whether the regulation is based on a permissible construction of the statute. *Chevron*, 467 U.S. at 843. **The regulation must be invalidated if it is "arbitrary, capricious, or manifestly contrary to the statute."** [Emphasis added]. *Id.* at 844. As discussed in full above, the regulation is patently contrary to the intent of the statute, as set forth in the history of the legislation. Since it appears that Congress has expressed its intent to measure the 75-mile distance using a radius computation, and because the regulation is arbitrarily applied, the Secretary of Labor's interpretation is not a permissible construction of the statute.

This Court has previously held in *Ragsdale v. Wolverine World Wide*, 535 U.S. 81, 122 S. Ct. 1155, 152 L. Ed. 2d 167 (2002) that **the Secretary of Labor was granted *limited authority* to prescribe regulations concerning the FMLA**. The Secretary of Labor does not have the right or authority to alter the coverage of the leave entitlement provided by Congress. In *Ragsdale*, this Court held that no further analysis was needed because the FMLA regulation [in that case § 825.700(a)]:

> effects an impermissible alteration of the statutory framework and cannot be within the Secretary's power to issue regulations "necessary to carry out" the Act under § 2654. In so holding we do not decide whether the notice and designation requirements are themselves valid or whether other means of enforcing them might be consistent with the statute. Whatever the bounds of the Secretary's discretion on this matter, they were exceeded here.

Ragsdale, 535 U.S. at 96.

Pursuant to 29 U.S.C. § 2654, the Secretary of Labor was only granted authority to "prescribe such regulations as are necessary to carry out" the Act. In the case at hand, the Secretary of Labor has again exceeded the authority granted to it by Congress by reducing the coverage of the FMLA. Because of the surface-mile measurement standard, the number of employees covered under the FMLA will be greatly reduced in larger numbers than what was intended. Clearly, Congress contemplated the fact that many workers will not be covered when it implemented the 50/75 rule, but Hackworth contends that it did not intend to further limit the coverage of the FMLA by

denying those employees within 75 radius miles any protection.

The surface-transportation method of measurement results in an absurd and arbitrary application of the FMLA. An employee may be denied coverage one day after a fellow employee was granted coverage simply because the state government decided to begin construction on the one roadway connecting the two worksites. One employee at a worksite within 75 radius miles of another may be eligible for coverage because the transportation route between worksites is straight, while another employee at a worksite within 75 radius miles of another worksite will be denied coverage because the roadway between the two sites has too many curves.

Moreover, the administrative regulation is confusing and capricious itself. It states that, "[a]bsent available surface transportation between worksites, the distance is measured by using the most frequently utilized mode of transportation (e.g. airline miles)." 29 C.F.R. § 825.111(b). This language can be read to say that if there is no road between the two worksites, then radius miles can be used. Therefore, although the situation is more grim for an employer (because it would theoretically be forced to transport an employee by airplane to another worksite), it is more beneficial to the employee.

In other words, the majority states that "it is only logical that conditions which negatively affect the viability of moving an employee from one worksite to another may well come into play." Appendix 14a. However, it is not logical to say that as the hardship on the employer to move an employee from one worksite to another increases, the employee's ability to be covered under the FMLA also

increases. Yet this is precisely what happens with the regulation in question. Although it would be worse for Progressive, it would be better for Hackworth if there was no road between Norman and Lawton. This simply makes no sense and exemplifies the arbitrary and capricious nature of the regulation in question.

The Fifth Circuit in *Bellum v. PCE Constructors, Inc.*, 407 F.3d 734, 739 (5th Cir. 2005) mentions a Grand Canyon example to show how a linear measurement may be deceiving and the majority cites that example in its Opinion. Appendix 11a. This example actually shows how arbitrary and capricious the regulation is. Even assuming there are businesses on the north and south rims of the Grand Canyon, this Court should take judicial notice that there are no highways or acceptable roads within the Grand Canyon in which employees can travel to the different worksites. Since this is the case, an employee working at one of the Grand Canyon offices would be covered under FMLA because her eligibility would be decided by radius miles. The employer with the worksites would have to shuttle the employee back and forth using an airplane, even though there are no airports on the north and south rims of the Grand Canyon. Neither the Fifth Circuit nor the majority addresses this issue in their decisions, but it evidences a problem with the regulation inherent in its own language.

In essence, the regulation should be struck down just as this Court struck down the FMLA regulation in *Ragsdale*. The Secretary has overstepped his authority, and instead of simply "carrying out" the provisions of the FMLA, has significantly altered the coverage of the Act. This alteration has placed the determination of eligibility under FMLA in the hands of the government as

it determines where to put its roadways. Additionally, the language of the regulation conflicts with the very purpose it intends to advance since it gives more protections to employees even though the hardships to the employer increase. Review is needed by this Court since the regulation is arbitrary, capricious and manifestly contrary to the statute.

IV. Review is Warranted Because the Majority Opinion Regarding Appellant's Motion Under Federal Rule of Civil Procedure 56(f) Conflicts with Prior Decisions of this Court and Other Circuit Courts

Hackworth contends that there is ample reason for this Court to review the majority's opinion for the reasons set forth above, but she further claims that review is warranted to review the issues involving Federal Rule of Civil Procedure 56(f). The majority states that Hackworth's real issue on appeal was that "the district court abused its discretion in refusing to grant Ms. Hackworth additional time to conduct discovery." Appendix 5a. In fact, **Hackworth never had *any* time to conduct discovery** and therefore could not even receive "additional" time. The majority's refusal to recognize the fact that Hackworth has been prejudiced because **she has been unable to conduct *any* discovery** to respond to the motion has caused its Opinion to come into conflict with other decisions by this Court and other circuit courts.

The error in the majority opinion is the determination of whether Hackworth should be allowed "additional" time to conduct discovery. Hackworth had zero time to conduct discovery since Respondents filed their motion for summary judgment before the Rule 26 conference or the

Status and Scheduling Conference, and no discovery is allowed before such conference. See Fed.R.Civ.P. 26(d). The ultimate question considered in this matter is not whether summary judgment can be entered although discovery is ongoing, but whether summary judgment can be entered when the non-moving party has not even had the opportunity to conduct any discovery of facts and evidence exclusively within the control of the moving party.

The answer to that conundrum lies within this Court's decision in *Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). The *Celotex* Court clearly stated the "plain language of Rule 56(c) mandates the entry of summary judgment, ***after adequate time for discovery*** and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." [Emphasis added]. *Celotex*, 477 U.S. at 322.

Additionally, this Court has found that if ***the non-moving party "has not had the opportunity to discover information that is essential to his opposition" summary judgment should not be granted.*** [Emphasis added]. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). And finally, while Respondents' exclusive control of the documents in this case does not automatically require relief under Rule 56(f), the movant's exclusive control of requested information is "a factor which weighs heavily in favor of relief under rule 56(f)." *Hebert v. Wicklund*, 744 F.2d 218, 222 (1st Cir. 1984); see also *Weir v. Anaconda Co.*, 773 F.2d 1073, 1083 (10th Cir. 1985).

The majority has also decided an issue in conflict with earlier Tenth Circuit language in *Weir*. The *Weir* Court held that there is no requirement in Rule 56 that summary judgment not be entered until discovery is complete, but **"sufficient time for discovery is *especially important* when relevant facts are exclusively in the control of the opposing party."** [Emphasis added]. *Weir*, 773 F.2d at 1081. The *Weir* Court further cited prior Tenth Circuit law to state that "summary judgment should not be based on the deposition or affidavit of an interested party . . . as to the facts known only to him – a situation where demeanor evidence might serve as real evidence to persuade a trier of fact to reject his testimony." *Weir*, 773 F.2d at 1081; quoting *Madison v. Deseret Livestock Co.*, 574 F.2d 1027, 1037 (10th Cir. 1978). And the *Weir* Court noted in a footnote that commentators generally recognize that courts should be cautious in granting summary judgment when relevant facts are peculiarly within the knowledge of the adverse party. *Weir*, 773 F.2d at 1081, fn. 8.

The ability to conduct discovery becomes increasingly important in the instant matter, because the overriding issue in this matter is whether Hackworth is an eligible employee under the FMLA. It has been held that the question of "eligible employee" status implicates both jurisdiction and the merits, and is properly reserved for the finder of fact. *Morrison v. Amway Corp.*, 323 F.3d 920, 928 (11th Cir. 2003). It has also been held that "whether plaintiff is an eligible employee under the FMLA should be decided on a complete record, after both plaintiff and defendant have had an opportunity to conduct discovery." *Fegueira v. Black Entertainment Television, Inc.*, 944 F.Supp. 299, 309 (S.D.N.Y. 1996). Therefore, by finding that the district court did not abuse its discretion in

refusing to grant Hackworth relief under Rule 56(f), the panel decision conflicts with these decisions and this Court should take review.

V. REVIEW IS WARRANTED BECAUSE THE MAJORITY OPINION IMPROPERLY LIMITS THE NON-MOVANT'S ABILITY TO UTILIZE FEDERAL RULE OF CIVIL PROCEDURE 56(f)

The majority finds that Hackworth's Rule 56(f) affidavit was submitted untimely and that the District Court did not abuse its discretion in refusing to grant Hackworth additional time for discovery. As stated above, Hackworth received zero time for discovery, but the majority also erred in finding that Hackworth's request under Rule 56(f) was untimely. This Court should take review to decide the issue of whether a request for relief under Rule 56(f) is untimely even if it was raised before the district court before the appeal process had begun.

Hackworth realizes that the request for relief under Fed.R.Civ.P. 56(f) generally should be made in opposition to a motion for summary judgment and not after the fact, and that it is "perilous for the opposing party neither to proffer any countering evidentiary materials nor file a 56(f) affidavit" in the original response to summary judgment. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 161 (1970) (quoting 6 J. Moore, Federal Practice and Procedure, Para. 56.22[2], pp. 2824-2825 (2d ed. 1966)). However, this Court has also stated, as has been discussed above, that motions for summary judgment should be adjudicated with due regard to the non-movant's right to contest the claim. *Celotex*, 477 U.S. at 327. Hackworth therefore contends that the majority Opinion's attempt to gauge the procedural validity of Hackworth's Rule 56(f)

motion by an examination of a calendar or stopwatch is contrary to established law. See *id.*; *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986); *Dowling v. City of Philadelphia*, 855 F.2d 136, 140 (3rd Cir. 1988) (indicating that Rule 56(f) submissions should be liberally treated by the court to achieve substantive purpose).

The majority Opinion incorrectly applies several cases to the instant situation although in those cases, a Rule 56(f) affidavit was never placed in front of the district court. See *Pasternak v. Lear Petroleum Exploration, Inc.*, 790 F.2d 828 (10th Cir. 1986); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664 (10th Cir. 1998); *Price, ex rel., Price v. W. Res. Inc.*, 232 F.3d 779 (10th Cir. 2000). It is undisputed that Hackworth, however, did file an affidavit under Rule 56(f).

The majority Opinion also conflicts with the Fed.R.Civ.P. 59 when it finds that "Rule 56(f) grants the district court the power to either deny a summary judgment motion or order a continuance; it does not grant the power to vacate a prior grant of summary judgment so that additional discovery can be conducted." Appendix 20a. Hackworth's motion to reconsider was brought under Rule 59, which does grant the district court the power to alter or amend a prior grant of summary judgment so that additional discovery can be conducted. The grounds warranting a motion to reconsider include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice. See *Servants of the Paraclete v. Doe*, 204 F.3d 1005, 1012 (10th Cir. 2000). As set forth in her briefs on this issue, Hackworth sought her motion to reconsider in order to correct clear error or prevent manifest injustice.

In summary, this case presents a question of exceptional importance because of the clear manifest injustice Hackworth has experienced. Cases with factual disputes should not be decided without conducting any discovery at all, and Hackworth should not be punished for certain unique timing issues, including the filing of the summary judgment before discovery could be conducted under Rule 26, and the Fifth Circuit's opinion on a similar issue right after the Court's Order granting summary judgment. Because the law does not mandate determining the validity or merits of Hackworth's Rule 56(f) affidavit based upon days or hours, but with due regard to the nonmovant's right to contest the claim, this Court should grant certiorari to review this matter.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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468 F.3d 722

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

KELLY HACKWORTH, Plaintiff-Appellant, v. PROGRESSIVE CASUALTY INSURANCE COMPANY, an Ohio corporation; JERRY JOHNSON, individually, Defendants-Appellees.	No. 05-6198 (Filed Nov. 14, 2006)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA (D.C. No. 05-CV-11-R)

Scott F. Brockman, (Stanley M. Ward and Woodrow K. Glass, on the briefs), Norman, Oklahoma, for Plaintiff-Appellant.

Brad Leslie Roberson, (Gerard F. Pignato and R. Thompson Cooper, on the brief), Pignato & Cooper, P.C., Oklahoma City, Oklahoma, for Defendants-Appellees.

Before **KELLY**, **HOLLOWAY**, and **McCONNELL**, Circuit Judges.

KELLY, Circuit Judge.

Plaintiff-Appellant Kelly Hackworth appeals from the district court's grant of summary judgment in favor of Defendants-Appellees Progressive Casualty Insurance Company and Jerry Johnson (collectively "Progressive") on her claim for damages pursuant to the Family and Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601-2654. Ms. Hackworth challenges deference to a Department of Labor ("DOL") regulation defining the term "within 75 miles" located in 29 U.S.C. § 2611(2)(B)(ii). Our jurisdiction arises under 28 U.S.C. § 1291, and we affirm due to the failure of Ms. Hackworth to establish her FMLA claim.

Background

Ms. Hackworth was employed at Progressive's Norman, Oklahoma worksite as an Injury Operations Manager II when, on March 19, 2004, she requested paid leave under the FMLA to care for her mother. In response, Ms. Hackworth's immediate supervisor, Jerry Johnson, told her to choose between a demotion to an Injury Operations Manager I and a severance package. He also gave her three days of paid time off work to make her decision.[1] At the end of the three day period, however, Ms. Hackworth was approved for FMLA leave.

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[1] The record is unclear whether Ms. Hackworth ever responded to Mr. Johnson's offer and, if so, what that response was.

During her FMLA leave, on April 23, 2004, Ms. Hackworth filed a charge of gender discrimination against Progressive with the Equal Employment Opportunity Commission ("EEOC"), alleging that Progressive had violated her rights under Title VII of the Civil Rights Act of 1964. On May 20, 2004, Ms. Hackworth and Progressive agreed to conduct a mediation, which was to occur on June 8, 2004, in an attempt to resolve Ms. Hackworth's gender discrimination claim against the company. Meanwhile, on or about May 28, 2004, Ms. Hackworth contacted Amy Harland, Progressive's Human Resource Consultant/Manager, to express her willingness to return to work because her FMLA leave was due to expire on June 1, 2004. Ms. Harland, however, directed Ms. Hackworth not to return to work until the mediation process was complete. At the conclusion of the June 8, 2004 EEOC mediation, by agreement of the parties, Ms. Hackworth's FMLA leave was extended through the close of business on June 22, 2004.

Before the close of business on June 22, 2004, Ms. Hackworth contacted Progressive and informed it of her intention to return to work as an Injury Operations Manager I. Ms. Harland, however, informed Ms. Hackworth not to return to work because the position of Injury Operations Manager I had been eliminated. Moreover, neither Ms. Harland nor any other agent or employee of Progressive offered Ms. Hackworth equivalent work or compensation. Ms. Hackworth subsequently brought suit in the district court against Progressive pursuant to 29 U.S.C. § 2617(a)(1) claiming it violated the FMLA in failing to reinstate her to the same or a similar position upon her return from FMLA leave in violation of 29 U.S.C. § 2614(a)(1), and in retaliating against her for utilizing the

FMLA to receive paid time off in violation of 29 U.S.C. § 2615(a)(1).

Progressive subsequently moved for summary judgment arguing that Ms. Hackworth was not an "eligible employee" under the FMLA because Progressive did not employ at least 50 people within 75 surface miles of Hackworth's Norman, Oklahoma worksite. Progressive admitted that at the time Ms. Hackworth began her FMLA leave it employed a combined total of 47 employees at its Norman worksite, where Ms. Hackworth was employed, and its Oklahoma City worksite, which is within 75 surface miles of its Norman worksite.[2] Progressive also admitted that it employed three additional employees at its Lawton, Oklahoma worksite but submitted evidence that that worksite is not within 75 surface miles of the Norman worksite. In opposition to summary judgment, Ms. Hackworth submitted evidence that the Lawton worksite is 75.6 surface miles[3] and 67 linear miles from the Norman worksite. Ms. Hackworth argued that the distance between the Lawton and Norman worksites should be measured "as the crow flies," i.e. in linear miles, and therefore 67 miles is the appropriate distance by which to measure the geographic proximity of the two

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[2] Specifically, Progressive admitted that its Oklahoma City worksite is 31.47 surface miles from its Norman worksite.

[3] Progressive submitted evidence that the Lawton worksite is 79.8 surface miles from the Norman worksite, rather than the 75.6 miles that Ms. Hackworth alleges. Neither party adduced evidence that the distance between the Lawton and Norman worksites is less than 75 surface miles. Because on summary judgment we view the evidence in the light most favorable to the nonmoving party, *Oliveros v. Mitchell*, 449 F.3d 1091, 1095 (10th Cir. 2006), we will assume for purposes of this appeal that the Lawton worksite is indeed 75.6 surface miles from the Norman worksite.

worksites. Thus, she argued that at the time her FMLA leave commenced Progressive employed 50 people within 75 miles of her worksite and she was an "eligible employee" under the FMLA.

The district court granted summary judgment to Progressive, holding that a DOL regulation, 29 C.F.R. § 825.111(b) (1995), which states that the 75-mile distance must be measured in surface miles, was owed judicial deference. This appeal followed. On appeal, Ms. Hackworth argues that: (1) Congress clearly intended that a "radius test," i.e. linear miles, be used when determining whether two worksites are "within 75 miles" of each other; (2) the DOL's use of a surface mile test is arbitrary and capricious; (3) 75.6 miles should be considered to be "within 75 miles"; (4) even assuming the Lawton worksite is not "within 75 miles" of the Norman worksite, the distance over 75 miles is so small that the court should nonetheless hold that Ms. Hackworth is an "eligible employee"; and (5) the district court abused its discretion in refusing to grant Ms. Hackworth additional time to conduct discovery.

Discussion

I. Standard of Review

Because the district court granted Progressive's motion for summary judgment, our review is de novo and we apply the same standards as the district court. *Adamson v. Unum Life Ins. Co.*, 455 F.3d 1209, 1212 (10th Cir. 2006). That is, summary judgment is appropriate where no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Moreover, we review a district court's

decision regarding the validity of an agency regulation de novo. *Reames v. Oklahoma ex. rel. OK Health Care Auth.*, 411 F.3d 1164, 1168 (10th Cir. 2005).

II. The Statutory and Regulatory Framework

The FMLA, 29 U.S.C. §§ 2601-2654, was enacted, in part, "to balance the demands of the workplace with the needs of families . . . [and] to entitle employees to take reasonable leave for medical reasons . . . in a manner that accommodates the legitimate interests of employers." *Id.* at § 2601(b). The FMLA therefore requires covered employers to provide eligible employees with up to twelve weeks of unpaid, job-protected medical leave per year, among other things, to care for a parent of the employee with a serious health condition. *See id.* § 2612(a)(1)(C). However, in furtherance of the balance between the needs of employees and the interests of employers, Congress included two exceptions to the FMLA's coverage. First, Congress excluded those employers with fewer than 50 total employees. *See id.* § 2611(4)(A)(i). Second, Congress excluded from the FMLA's coverage those employees whose employer employs fewer than 50 people "within 75 miles" of the employee's worksite ("the 50/75 provision").[4]

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[4] If an employer does not employ at least 50 people "within 75 miles" of an individual's worksite, that individual is not an "eligible employee" for FMLA purposes. *See* 29 U.S.C. § 2611(2)(B). Despite Progressive's contention, however, one's failure to qualify as an "eligible employee" does not mean this court lacks subject matter jurisdiction. *See Arbaugh v. Y & H Corp.*, 126 S. Ct. 1235, 1245 (2006) ("[T]he threshold number of employees for application of Title VII is an element of a plaintiff's claim for relief, not a jurisdictional issue."); *Minard v. ITC Deltacom Commc'ns, Inc.*, 447 F.3d 352, 357 (5th Cir. 2006) ("*Arbaugh* has clearly rejected the conflicting view of the Courts of Appeals . . . that employee-numerosity requirements in the FMLA and

(Continued on following page)

See id. § 2611(2)(B)(ii). Congress recognized that, given these two exceptions, the FMLA would only cover approximately "5 percent of U.S. employers and 40 percent of U.S. employees." S. Rep. No. 102-68, at 24 (1991); *see also* H.R. Rep. No. 102-35(I), at 37 (1991).

Congress, in the FMLA, also expressly granted the Secretary of Labor the power to "prescribe such regulations as are necessary to carry out [the FMLA]." 29 U.S.C. § 2654. Pursuant to this grant of power, the DOL promulgated a regulation, in part, to clarify the method to use in determining whether two worksites are "within 75 miles" of one another, which provides:

> The 75-mile distance is measured by surface miles, using surface transportation over public streets, roads, highways and waterways, by the shortest route from the facility where the eligible employee needing leave is employed. Absent available surface transportation between worksites, the distance is measured by using the most frequently utilized mode of transportation (e.g. airline miles).

29 C.F.R. § 825.111(b) (1995).[5] The primary question we must resolve in this appeal is whether § 825.111(b) is a valid regulation implementing the FMLA.

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other statutes are jurisdictional rather than simply an element of a plaintiff's claim for relief.").

[5] Additionally, 29 C.F.R. 825.110(f) (1995) provides that "[w]hether 50 employees are employed within 75 miles to ascertain an employee's eligibility for FMLA benefits is determined when the employee gives notice of the need for leave."

III. Judicial Deference to 29 C.F.R. § 825.111(b)

Ms. Hackworth challenges the DOL regulation clarifying that surface miles are to be used in determining whether two worksites are "within 75 miles" of one another. The standard to be used in analyzing an agency's construction of a statute it administers, articulated by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), is well-known and oft-applied. Pursuant to *Chevron*, we must analyze such a construction in a two-step process. *Id.* at 842-44. First, we look to whether Congress directly spoke to the precise question at issue. *Id.* at 842. In so doing, we look to, among other things, the statutory text, history, and purpose. *See Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004). If congressional intent is clear on the precise question at issue, our analysis ends and the congressional intent is given effect. *Chevron*, 467 U.S. at 842-43. This follows from the fact that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843 n.9.

If congressional intent is ambiguous, we proceed to the second step in the *Chevron* analysis and look to "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. Because administrative agencies are ordinarily more adept at reconciling conflicting policies within their areas of expertise than are courts, we uphold an agency's construction of a statute it administers so long as it is not arbitrary, capricious, or manifestly contrary to the statute at issue. *Id.* at 844; *Harbert v. Healthcare Servs. Group*, 391 F.3d 1140, 1147 (10th Cir. 2004).

A. *Chevron Step One*

As previously mentioned, *Chevron* first demands that we determine whether Congress clearly spoke as to the method to be used in ascertaining whether two worksites are "within 75 miles" of one another. 467 U.S. at 842. Ms. Hackworth argues that Congress clearly spoke on this precise issue in that the House and Senate Reports accompanying the FMLA, in several instances, provide that the aggregation of employees at geographically distinct worksites is limited to those facilities within a "75-mile radius." Ms. Hackworth contends that use of the word "radius" demonstrates that Congress clearly meant for a linear mileage test to be used, rather than a surface mileage test. The text and purpose of the 50/75 provision, however, belie Ms. Hackworth's argument.

Congress did not expressly indicate in 29 U.S.C. § 2611(2)(B)(ii) how one should measure the geographic proximity of two distinct worksites. That subsection simply states that two worksites must be "within 75 miles" of one another, and is devoid of the word "radius" that Ms. Hackworth finds so crucial. While the term "within 75 miles" is not inherently ambiguous, *Bellum v. PCE Constructors, Inc.*, 407 F.3d 734, 739 (5th Cir. 2005), this case itself demonstrates that reasonable people may differ on the term's meaning. In fact, at oral argument, Ms. Hackworth's counsel conceded that congressional intent is not clear from the text of § 2611(2)(B)(ii) standing alone. The FMLA also does not otherwise indicate how the geographic proximity of two worksites should be measured. Thus, Congress did not express its clear intent with regard to the precise question at issue in the statutory text.

Turning to statutory purpose, as previously noted, the FMLA was enacted, in part, "to balance the demands of the workplace with the needs of families . . . [and] to entitle employees to take reasonable leave for medical reasons . . . in a manner that accommodates the legitimate interests of employers." 29 U.S.C. § 2601(b). In striking this balance, Congress provided an exception to the FMLA's coverage "for small operations – that is, a potentially large company with a relatively small satellite office in a particular area." *Harbert,* 391 F.3d at 1148 (discussing 29 U.S.C. § 2611(2)(B)(ii)). The 50/75 provision was specifically designed to accommodate employer concerns about "the difficulties an employer may have in reassigning workers to geographically separate facilities." H.R. Rep. No. 102-135(I), at 37 (1991); *see Moreau v. Air France,* 356 F.3d 942, 945-46 (9th Cir. 2004) ("[I]t might be reasonable to expect an employer to relocate workers from nearby facilities for the period of an FMLA leave . . . , but it would be understandably more difficult to reassign an employee whose family lives in Los Angeles to work in San Francisco for three months.").

Given the statutory purpose of the FMLA and the 50/75 provision, it does not appear that Congress clearly intended that the geographic proximity of two worksites is to be measured in linear miles. In fact, the statutory purpose for the 50/75 provision indicates that Congress just as likely intended a surface measurement to be utilized. The difference in the time and cost of transportation between a covering employee's home worksite and a new, temporary worksite is a significant impediment to employers with far-flung operations in covering for employees who take FMLA leave. While in many instances the geographic proximity of two worksites measured in

linear miles is an adequate proxy for the feasability of transferring employees between those worksites, there are a few circumstances in which a linear measurement is deceiving. *See Bellum,* 407 F.3d at 739 (giving an example of a company that is forced to transfer employees between offices on the north and south rims of the Grand Canyon). On the other hand, the distance between two worksites measured in surface miles is nearly always a reasonable proxy for the feasibility of temporarily relocating an employee to another worksite because "the overwhelming majority of workers in this country use surface transportation to get to work. . . . " *Id.* at 740. As a result, the 50/75 provision's statutory purpose does not support the use of one measurement more than the other.

Ms. Hackworth correctly points out that Congress, on numerous occasions in both the House and Senate Reports accompanying the FMLA, states that an employer must, in order to be covered by the FMLA, employ at least 50 people "within a 75-mile *radius.*" *See, e.g.,* H.R. Rep. 102-35(I), at 37 (1991) ("[T]here is a geographic limitation of *a 75-mile radius* that applies to the aggregation of employees at different facilities." (emphasis added)); S. Rep. No. 103-3, at 2 (1993) ("The employer must, in addition, employ at least 50 people within *a 75-mile radius* of the employee's worksite." (emphasis added)). For two reasons, we conclude that this does not evidence a clear congressional intent that the 75-mile distance be measured "as the crow flies." First, while the House and Senate Reports include the term "radius" on several occasions, they also omit the term numerous times. *See, e.g.,* H.R. Rep. No. 102-35(I), at 54 (1991) ("Title I would not apply to any employer of less than 50 workers if the total number of employees employed by that employer *within 75 miles* of

that worksite is less than 50." (emphasis added)); S. Rep. No. 102-68, at 45 (1991) ("The employees at . . . a worksite are not covered by the bill if the total number of those employed by the employer *within 75 miles* of the worksite is less than 50." (emphasis added)). This irregular use of the term is not sufficient to evidence a clear congressional intent. *See Miller v. Comm'r,* 836 F.2d 1274, 1282 (10th Cir. 1988) ("Though legislative history may be examined as a secondary source of a statute's meaning, the weight such history is given in construing a statute may vary according to factors such as whether the legislative history is sufficiently specific, clear and uniform to be a reliable indicator of intent."). Second, there is nothing in the legislative history to indicate that Congress, in the few instances in which it used the term "radius," was using that term in a technical, rather than a colloquial, sense. Consequently, we find more persuasive that Congress did not define a method of measuring the geographic proximity of two worksites and therefore left an implicit statutory gap that 29 U.S.C. § 2654 authorizes the Secretary of Labor to fill.

B. *Chevron Step Two*

When Congress leaves an implicit statutory gap, we simply ask "whether the [regulation] is based on a permissible construction of the statute." *Chevron,* 467 U.S. at 843. Because invalidating an agency regulation is strong medicine, we will only do so when the regulation is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844. "[T]he agency's interpretation need not be the only one it could have adopted, or the one that this court would have reached had the question initially arisen in a judicial proceeding." *Anderson v. U.S. Dep't of Labor,* 422 F.3d

1155, 1181 (10th Cir. 2005) (quoting *Salt Lake City v. W. Area Power Admin.*, 926 F.2d 974, 978 (10th Cir. 1991)).

Several factors support the reasonableness of 29 C.F.R. § 825.111(b) and lead us to conclude that it is consistent with the FMLA. First, the regulation represents a plausible and reasonable reading of the term "within 75 miles" contained in 29 U.S.C. § 2611(2)(B)(ii). Second, as noted, the regulation furthers the 50/75 provision's purpose in that a surface measurement is a reasonable proxy for judging an employer's ability to relocate an employee from one worksite to another in order to cover for an employee on FMLA leave. The FMLA recognizes that "if any employer (large or small) has no significant pool of employees *nearby* to cover for an absent employee, that employer should not be required to provide FMLA leave to that employee." *Harbert,* 391 F.3d at 1149. The use of surface miles is a fair, reasonably accurate and commonly-understood method of determining whether an employer has a significant pool of substitute workers nearby. Third, the regulation is not crafted in such a way that it unreasonably favors employers over employees. Rather, the regulation rationally furthers the FMLA's goal "to entitle employees to take reasonable leave for medical reasons . . . in a manner that accommodates the legitimate interests of employers." 29 U.S.C. § 2601(b). Finally, the only one of our sister circuits to consider the issue before us, the Fifth Circuit, has upheld 29 C.F.R. § 825.111(b) as consistent with the FMLA. *See Bellum,* 407 F.3d at 740 (holding that 29 C.F.R. § 825.111(b) is entitled to *Chevron* deference).

In an attempt to demonstrate that a surface measurement is arbitrary and capricious, Ms. Hackworth proffers several "real-world example[s]." First, she argues that 29 C.F.R. § 825.111(b) operates in an arbitrary manner because

"leave under [the] FMLA literally depends on how straight a road is." Aplt. Br. at 12. Ms. Hackworth points out that a company's employees could be ineligible for FMLA leave simply because they have the misfortune of being employed with a company whose worksites are located on a road that "zigs and zags." Ms. Hackworth also suggests that § 825.111(b) is arbitrary because an employee may suddenly lose eligibility for FMLA leave when a detour is created because a route between two worksites comes under construction, thereby rendering the driving distance between the two points greater than 75 surface miles. Finally, Ms. Hackworth points out that employees working in heavily populated areas are more likely to be eligible for FMLA leave under the DOL regulation than those working in sparsely populated areas, as a result of the greater number of public roads available to employees working in heavily populated regions.

Although Ms. Hackworth is correct that an employee's eligibility for FMLA leave could conceivably vary depending on how straight a particular road is, whether a particular road is under construction, or how many public roadways are located in a particular region, that does not render § 825.111(b) arbitrary and capricious. Rather, we see no reason why such considerations should not be factored into the eligibility calculus given the balance the FMLA strikes between the needs of an employee and the employer. Because the 50/75 provision was intended to protect employers who do not have a sufficient source of substitute employees nearby to cover for an absent employee, it is only logical that conditions which negatively affect the viability of moving an employee from one worksite to another may well come into play. This is true even if conditions such as the straightness of an interstate or the

presence of road construction may be occasionally determinative of an employee's eligibility status.

Finally, at oral argument, Ms. Hackworth's counsel argued that the arbitrariness of § 825.111(b) is demonstrated by the fact that courts, in analyzing the 100-mile limitation on service of process contained within Fed. R. Civ. P. 4(k) and in determining the relevant geographic market for antitrust liability purposes under the Sherman Act, measure distance "as the crow flies." *See Sprow v. Hartford Ins. Co.,* 594 F.2d 412, 417-18 (5th Cir. 1979) (holding that distance for purposes of Fed. R. Civ. P. 4[(k)] is to be measured "as the crow flies"); *Pierce v. Globemaster Baltimore, Inc.,* 49 F.R.D. 63, 66 (D. Md. 1969) (same); *Gordon v. Lewistown Hosp.,* 423 F.3d 184, 212 (3d Cir. 2005) (holding that the district court's use of a linear measurement in crafting the relevant geographic market was not clearly erroneous). This argument, though creative, is unavailing. The statutory purpose underlying the 50/75 provision and those underlying Fed. R. Civ. P. 4(k) and the Sherman Act are certainly not the same; therefore, the type of geographic measurement used with regard to Fed. R. Civ. P. 4(k) and the Sherman Act has little or no relevance to which measurement should be used with regard to the 50/75 provision. Moreover, even assuming the purposes underlying the three were similar, the question we must answer pursuant to *Chevron* is not whether we would employ a surface measurement in the first instance, *see Bellum,* 407 F.3d at 740 n.7 ("[T]he only question for us is whether the Secretary's construction of the statute is permissible, not the best."), but whether the DOL's use of a surface measurement is arbitrary, capricious, or contrary to the FMLA. We hold it is not.

Thus, Ms. Hackworth, in order to survive summary judgment, was required to produce evidence tending to show that Progressive employed at least 50 employees within 75 surface miles of its Norman worksite. Because Ms. Hackworth failed to rebut Progressive's evidence that it only employed 47 individuals within 75 surface miles of its Norman worksite, we affirm the district court's grant of summary judgment to Progressive because, at the time Ms. Hackworth requested FMLA leave, she was not an "eligible employee."

IV. Additional Arguments Regarding Eligibility

Ms. Hackworth makes two additional arguments in support of her eligibility for FMLA leave notwithstanding the 50/75 provision. First, she argues that the 75.6 surface mile distance between Progressive's Norman and Lawton worksites should be considered "within 75 miles," thereby rendering her eligible for FMLA leave. The common meaning, however, of the word "within" as being "below the number or amount mentioned" contradicts Ms. Hackworth's argument. Oxford English Dictionary Online (from the 2d print ed. 1989). In using the term "within 75 miles," Congress, at most, intended that, in order to be an eligible employee, one's employer must employ an aggregate of at least 50 people at worksites which are a distance of *75 miles or less* from one another. Being that the Norman worksite is 75.6 surface miles away from the Lawton worksite, those two worksites cannot be considered "within 75 miles" of one another.

Second, Ms. Hackworth asserts that the intent of the 50/75 provision "is not advanced by its application in this matter," and consequently, she requests that we make an

exception in this case and find that she is an eligible employee. She contends that application of the mileage limitation in this case does not advance the intent of the 50/75 provision because "Progressive is [in] no way prejudiced by conceivably having a Lawton employee drive an extra six-tenths of a mile to fill in for Hackworth at the Norman site" and because "Progressive could have filled Hackworth's position . . . with an employee from any of the offices in Oklahoma, . . . because the Norman site was not essential to Hackworth's job duties." Aplt. Br. at 21, 22. Even assuming, without deciding, that the intent of the 50/75 provision is not furthered by its application in this case, that in no way changes the fact that Congress included the 50/75 provision in the FMLA as a limitation on the class of eligible employees, and that the authority to create an additional exception to that provision lies with Congress, not the courts. *See Special Devices, Inc. v. OEA, Inc.*, 270 F.3d 1353, 1357 (Fed. Cir. 2001) ("If [] an exception is to be created, Congress, not this court, must create it."); *United States v. Petrov*, 747 F.2d 824, 826 (2d Cir. 1984) ("[W]e think it is for [C]ongress, and not this court, to create exceptions to [a] statute's clearly expressed, broad coverage.").

V. Additional Time for Discovery

Ms. Hackworth alternatively requests that we reverse the district court's decision and remand the case so that she may conduct additional discovery. Ms. Hackworth contends that the district court abused its discretion in denying her request for additional discovery pursuant to Rule 56(f) of the Federal Rules of Civil Procedure because (1) additional discovery is needed to ensure that all of Progressive's Oklahoma employees are accounted for and

(2) the difference between her eligibility and non-eligibility is only three employees. Ms. Hackworth admits, however, that she failed to file an affidavit pursuant to Rule 56(f) in response to Progressive's motion for summary judgment. In an effort to convince us that she fully complied with Rule 56(f)'s dictates, Ms. Hackworth instead relies on statements made in her response brief to Progressive's motion for summary judgment and on an affidavit attached to her motion for reconsideration following the district court's grant of summary judgment. We must, therefore, determine whether these actions were sufficient to satisfy Rule 56(f) and whether the district court abused its discretion in denying additional discovery. *See Price ex. rel. Price v. W. Res., Inc.*, 232 F.3d 779, 783 (10th Cir. 2000) (holding that a district court's decision to deny relief under Rule 56(f) is reviewed for an abuse of discretion).

Rule 56(f) grants a court discretion to deny summary judgment or order a continuance when the nonmovant submits an affidavit averring that it possesses insufficient facts to oppose a summary judgment motion. Fed. R. Civ. P. 56(f).[6] The crux of Rule 56(f) is that "summary judgment [should] be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Anderson v. Liberty Lobby, Inc.*, 477

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[6] Rule 56(f) specifically provides:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Fed. R. Civ. P. 56(f).

U.S. 242, 250 n.5 (1986). The nonmoving party, however, must expressly invoke Rule 56(f)'s protections and, in so doing, must satisfy certain requirements. *Price,* 232 F.3d at 783. More specifically, the nonmovant must submit an affidavit "identifying the probable facts not available and what steps have been taken to obtain these facts" and must "explain how additional time will enable him to rebut movant's allegations of no genuine issue of fact." *Comm. for the First Amendment v. Campbell,* 962 F.2d 1517, 1522 (10th Cir. 1992).

Here, Ms. Hackworth's statements, made in her response brief to Progressive's motion for summary judgment, to the effect that she "has not had a chance to review Progressive's payroll records to determine if the [employee] number represented . . . is correct or incorrect," are obviously insufficient to comply with Rule 56(f). *Cf. Pasternak v. Lear Petroleum Exploration, Inc.,* 790 F.2d 828, 833 (10th Cir. 1986) (holding that the statement "Although discovery has not yet been completed . . . " contained within the nonmovant's response brief was insufficient to comply with Rule 56(f)). These statements are not contained within an affidavit, do not explain what steps have already been taken to obtain information regarding the accuracy of Progressive's stated employee number, and do not explain how additional time will enable Ms. Hackworth to oppose Progressive's summary judgment motion. *See Campbell,* 962 F.2d at 1522 ("[C]ounsel's unverified assertion in a memorandum opposing summary judgment does not comply with Rule 56(f) and results in a waiver.").

Similarly, the affidavit of Ms. Hackworth's counsel attached to her motion for reconsideration, which was filed following the district court's grant of summary judgment,

is ineffectual because it was untimely. A nonmoving party wishing to invoke the protections of Rule 56(f) must attempt to do so by submitting an affidavit in direct response to a motion for summary judgment, not following the district court's disposition of that motion. *See Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 672 (10th Cir. 1998) ("[T]he nonmovant must carry its burden in the district court in a timely fashion pursuant to Rule 56(e) and *Celotex* or explain why it cannot pursuant to Rule 56(f). Otherwise, the nonmovant acts, or fails to act, at its peril." (internal citation omitted)). Rule 56(f) grants the district court the power to either deny a summary judgment motion or order a continuance; it does not grant the power to vacate a prior grant of summary judgment so that additional discovery can be conducted. *See* Fed. R. Civ. P. 56(f). Because Ms. Hackworth's statements in her response brief to the motion for summary judgment did not comply with Rule 56(f)'s requirements and the Rule 56(f) affidavit her counsel submitted was untimely, we conclude that the district court did not abuse its discretion in refusing to grant Ms. Hackworth additional time for discovery.[7] *See Pasternak*, 790 F.2d at 832-33 ("Where a

[7] In arguing that the district court prematurely granted summary judgment, Ms. Hackworth cites *Weir v. Anaconda Co.*, 773 F.2d 1073, 1081-82 (10th Cir. 1985), inter alia, for the proposition that a party "should be given sufficient time to conduct discovery where relevant facts are exclusively in the control of the opposing party." Aplt. Reply Br. at 5. Ms. Hackworth, however, omits the *Weir* court's statement that, "There is no requirement in Rule 56, Fed. R. Civ. P., that summary judgment not be entered until discovery is complete." 773 F.2d at 1081. The *Weir* court additionally observed that "[i]n the absence of a Rule 56(f) affidavit, other courts have generally upheld the grant of summary judgment before the completion of discovery." *Id.* at 1083 n.10. Finally, whether evidence is within the exclusive control of the opposing party only becomes a factor, and not a controlling one, where the

(Continued on following page)

party opposing summary judgment and seeking a continuance pending completion of discovery fails to take advantage of the shelter provided by Rule 56(f) by filing an affidavit, there is no abuse of discretion in granting summary judgment if it is otherwise appropriate.").

AFFIRMED.

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nonmovant timely submits an affidavit which fully complies with Rule 56(f). *See id.* at 1083. Ms. Hackworth never submitted such an affidavit.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

KELLY HACKWORTH,	)	
Plaintiff,	)	
v.	)	
PROGRESSIVE CASUALTY INSURANCE COMPANY, an Ohio corporation, and JERRY JOHNSON, individually,	)	**CIV-05-11-R**
Defendants.	)	

ORDER

Before the Court is Plaintiff's motion for reconsideration of this Court's Order of April 28, 2005. This motion is DENIED.

First, grounds warranting a motion to reconsider include an intervening change in the law, new evidence previously unavailable and the need to correct or prevent manifest injustice. *Servants of the Paraclete v. Does,* 204 F.3d 1005, 1012 (10th Cir. 2000). A motion to reconsider is not properly brought to revisit issues already addressed or advance arguments that could have been raised in prior briefing. *Id.*

Secondly, in ascertaining whether Congress expressed a clear intent as to the meaning of "within 75 miles" as used in 29 U.S.C. § 2611(2)(B)(ii), that is, how the 75-mile distance is to be measured, examination of the legislative history is proper. *See Harbert v. Healthcare Services Group,* 391 F.3d 1140, 1147 (10th Cir. 2004), *citing General Dynamics Land Systems, Inc. v. Cline,* 540 U.S. 581, 124

S.Ct. 1236, 1248-49, 157 L.Ed.2d 1094 (2004). However, the reference in the House Report, 102-135, Part I, to "a geographic limitation of a 75-mile radius that applies to the aggregation of employees at different facilities," H.R. Rep. No. 102-135 (I) at 37 (1991), which Plaintiff relies upon, is ambiguous and does not clearly express Congress' intent on the precise issue as to whether the 75-mile distance or 75-mile radius is to be measured in driving distance or as the crow flies. Accordingly, the Court properly proceeded to the second step of the *Chevron* analysis in its Order of April 28, 2005, and ultimately concluded that the regulation defining the 75-mile distance by surface miles over public roadways and waterways and, in the absence of available surface transportation, by airline miles, *see* 29 C.F.R. § 825.111(b), was entitled to controlling weight because it was not arbitrary, capricious or contrary to the statute.

Thirdly, the fact that MNS Maps measures the driving distance between the Norman worksite and the Lawton office as 75.6 miles does not create a genuine issue of material fact because even that distance exceeds the 75-mile distance specified in 29 U.S.C. § 2611(2)(B)(ii). Despite the seemingly harsh results, this Court is without authority to deviate from the 75-mile distance limitation or to ignore the .6 mile difference in distance (under MNS Maps) that a replacement employee from the Lawton office would have had to drive to fill in for the Plaintiff at the Norman office. *A fortiori,* the Court could not do so under the guise of advancing the purpose of the FMLA.

Plaintiffs request for additional time to conduct discovery directed to the number of employees that Defendant employed within 75 miles of Plaintiff's worksite at the relevant time is denied. Plaintiff could have invoked

Rule 56(f), F.R.Civ.P., when she filed her response to Defendant's motion for summary judgment but she did not do so, choosing instead to rely on her evidence of the distance between the Lawton and Norman offices "as the crow flies" to avoid summary judgment. Even now, Plaintiff has failed to submit an affidavit as required by Rule 56(f) and comporting with the requirements set forth by the Tenth Circuit, *see, e.g., Price v. Western Resources, Inc.*, 232 F.3d 779, 783 (10th Cir. 2000), although that failure was apparently inadvertent.

IT IS SO ORDERED this 5th day of May, 2005.

/s/ David L. Russell
DAVID L. RUSSELL
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

KELLY HACKWORTH,	)	
Plaintiff,	)	
v.	)	
PROGRESSIVE CASUALTY INSURANCE COMPANY, an Ohio corporation, and JERRY JOHNSON, individually,	)	**CIV-05-11-R**
Defendants.	)	

ORDER

Before the Court is Defendants' motion for summary judgment on the issue of subject matter jurisdiction. By this motion, Defendants challenge the factual basis for jurisdiction under the Family and Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601-2654, relying on matters outside the pleadings to support their motion. They assert that because Defendant Progressive Casualty Insurance Company employs less than 50 employees at Plaintiff's former worksite in Norman, Oklahoma, and employs less than 50 employees within 75 miles of that worksite, Plaintiff is not an "eligible employee" under the FMLA and the Court is without subject matter jurisdiction under that Act.

Defendants properly filed their motion as one for summary judgment. When a defendant by a motion makes a factual attack on subject matter jurisdiction, relying on matters outside the pleadings, and the jurisdictional issue is intertwined with the merits, the motion is properly

treated as one for summary judgment. *See Trainor v. Apollo Metal Specialties, Inc.*, 318 F.3d 976, 978 (10th Cir. 2002); *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995). The jurisdictional question is intertwined with the merits if subject matter jurisdiction is dependent upon the same statute which provides the substantive claim in the case. *Id.* The question of "eligible employee" status implicates both jurisdiction and the merits and a motion directed to such status which relies on matters outside the pleadings is properly filed as or treated as one for summary judgment. *See Morrison v. Amway Corp.*, 323 F.3d 920, 928 & 929-30 (11th Cir. 2003); *Knight v. Industrial Distribution Group, Inc.*, 2004 WL 2300477 at *2-3 (D.N.H. Oct. 12, 2004) (No. Civ. 04-182-SM); *Collinsworth v. Earthlink/Onemain, Inc.*, 2003 WL 22916461 at *1 & n. 1 (D. Kan. Dec. 4, 2003) (No. Civ. A. 03-2299GTV).

Defendants have submitted evidence that Defendant Progressive employs a total of 47 employees at its Norman, Oklahoma, worksite, where Plaintiff was employed, and its Oklahoma City worksite, which is within 75 miles of the Norman worksite, and that none of its other worksites in Oklahoma is within 75 miles of the Norman worksite, based upon Mapquest driving miles. Plaintiff, on the other hand, has produced evidence that Defendant Progressive's Lawton office is 67 miles from its Norman worksite, "as the crow flies," i.e., according to Geocode.com, and, according to Defendants' own evidence, it employs 3 employees at its Lawton worksite. Thus, Plaintiff has submitted evidence that she is not excluded from the definition of "eligible employee" because the total number of employees employed by Defendant Progressive within 75 miles of the worksite at which Plaintiff was employed when she requested FMLA leave was not "less

than 50." 29 U.S.C. § 2611(2)(B)(ii). *See* 29 U.S.C. § 2611(2)(A) (defining "eligible employee"). However, Plaintiff's evidence does not create a genuine issue of material fact as to whether the Court has jurisdiction and Plaintiff can establish her claims under the FMLA, because the Secretary of Labor's regulations implementing the FMLA provide that "[t]he 75-mile distance is measured by surface miles, using surface transportation over public streets, roads, highways and waterways, by the shortest route from the facility where the eligible employee needing leave is employed." 29 C.F.R. § 825.111(b). In the absence of available surface transportation between worksites, the distance is measured by the most frequently utilized mode of transportation, e.g., airline miles. *Id.* Congress in the FMLA did not express its intent as to how the 75-mile distance is to be calculated so the Court must give controlling weight to the agency's construction of the statute unless it is arbitrary, capricious or contrary to the statute. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); *Harbert v. Healthcare Services Group, Inc.*, 391 F.3d 1140, 1149 (10th Cir. 2004). The Court concludes that the regulation defining "within 75 miles" comports with the common meaning or usage of that term and the purpose underlying 29 U.S.C. § 2611(2)(B)(ii), to exempt from FMLA coverage employees of employers who do not have a signified pool of employees nearby to cover for absent employees, *see Harbert v. Healthcare Services Group, Inc.*, 391 F.3d at 1149, who in most circumstances would have to drive to the worksite to do so. Moreover, the regulation defining how the 75-mile distance is calculated creates no arbitrary distinctions. Accordingly, the Court concludes that the regulation is not arbitrary, capricious or contrary

to the statute but is valid and entitled to controlling weight. *See id.* at 1149-51.

In accordance with the foregoing, no genuine issue of material fact exists. Defendant employs less than 50 employees at Plaintiff's worksite and less than 50 employees within 75 miles of Plaintiff's worksite, measured, as required by 29 C.F.R. § 825.111(b), in driving miles. Plaintiff was not an "eligible employee" under the FMLA, 29 U.S.C. §§ 2611(2)(A) & (B), there is no FMLA coverage and the Court is without subject matter jurisdiction. Defendant's motion for summary judgment is GRANTED and this case is DISMISSED.

IT IS SO ORDERED this 28th day of April, 2005.

/s/ David L. Russell
DAVID L. RUSSELL
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

KELLY HACKWORTH, Plaintiff-Appellant, v. PROGRESSIVE CASUALTY INSURANCE COMPANY, an Ohio corporation; JERRY JOHNSON, individually, Defendants-Appellees.	No. 05-6198

ORDER

(Filed December 18, 2006)

Before **KELLY**, **HOLLOWAY**, and **McCONNELL**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

by: [Illegible]
Deputy Clerk